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289-107—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 874

STEPHEN SPIRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C and D) is not yet reported. The opinion and findings of fact of the district court (Pet. App. A and B) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1967. A petition for a rehearing was denied on October 20, 1967. The time for filing a petition for a writ of certiorari was extended to and including December 4, 1967, by Mr. Justice Brennan, and the petition was filed on December 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly denied conscientious objector status and given a I–A Selective Service classification in view of his adherence to the "just war" doctrine allegedly found in certain writings of persons associated with the Roman Catholic Church.

2. Whether petitioner was denied procedural due process incident to his classification as I–A.

STATUTES AND REGULATIONS INVOLVED

Sections 6(j) (50 U.S.C. App. 456(j)) and 12(a) (50 U.S.C. App. 462(a)) of the Universal Military Training and Service Act, 62 Stat. 604 *et seq.*, as amended, and pertinent regulations of the Selective Service System are contained in Appendix E to the petition (pp. 19a–25a).

STATEMENT

Petitioner, having waived a jury, was convicted in the United States District Court for the District of New Jersey for failing to submit to induction in the Armed Forces of the United States in violation of 50 U.S.C. App. 462(a) (A. App. 85a–95a).[1] He was sentenced to imprisonment for a period of two years (A. App. 97a). The court of appeals affirmed (Pet. App. C and D, 10a–17a).

Petitioner, a practicing Roman Catholic, registered with his local Selective Service Board, located in Hackensack, New Jersey, in January 1958. He did

[1] The record filed with the Clerk of this Court consists of Appellant's Appendix (A. App.) and Supplemental Appendix (S. App.) and the Government's Appendix (G. App.) in the court of appeals.

not then claim conscientious objection to participation in war in any form (A. App. 7a, 33a–34a; G. App. 2), and was classified I–A (A. App. 52a). In the fall of 1957, petitioner had commenced an on-and-off course of study at the University of Chicago (A. App. 50a–53a; G. App. 3–7). It was not until October 1961 that his Local Board was notified of his student status; he was then reclassified II–S (student) for the 1961-1962 school term—his senior year (A. App. 8a, 52a; G. App. 6). Petitioner dropped out of school in January 1962 and his Local Board was so notified in February 1962 by the university (A. App. 52a–53a; G. App. 6–7). Petitioner visited his Local Board on March 13, 1962, to inquire concerning the possibility of his being inducted (G. App. 7). On that same day he was reclassified I–A (A. App. 53a; G. App. 7). In April 1962, petitioner took the qualification examination for the United States Air Force (A. App. 54a; G. App. 7). On June 7, 1962, petitioner's Local Board mailed him directions to report for his Armed Forces physical examination on July 26, 1962 (G. App. 7). At his request, this was delayed and the place of examination was shifted to Chicago, where petitioner was then living (G. App. 7). During July or August 1962, petitioner filled out an application and was pre-processed for the Naval Air Reserve at the Glenview Naval Air Station in Illinois, the papers to be held until it was determined whether he would return to school in the fall (A. App. 54a–55a; G. App. 7). Petitioner took his Armed Forces physical examination pursuant to the direction of his New Jersey Local Board in Chicago on August 31, 1962. He was found physically

qualified for induction into the Armed Forces (A. App. 53a–55a; G. App. 7–8).

In August 1962, petitioner joined the Student Peace Union in Chicago (A. App. 55a; G. App. 8). In the course of his activities with that organization he reviewed a book which introduced him to certain Catholic thought on the doctrine of "just" and "unjust" wars, opening up "new areas of thought which I never realized existed" (A. App. 55a, 74a). Further research in the fall of 1962 crystallized petitioner's acceptance of the "just war" theory and, on November 13, 1962, he wrote his Local Board requesting the special form for conscientious objectors (A. App. 9a, 55a–56a; G. App. 8). Petitioner completed the form, with enclosures elaborating on the just war doctrine and his application of it to current military policy of the United States (particularly in regard to nuclear war), and mailed them to the board (A. App. 9a, 56a–57a; S. App. 1a–8a; G. App. 8). As a result, the Local Board classified petitioner I–A–O (exempt from combatant duties) on December 11, 1962 (A. App. 9a–10a, 57a). Since he had asked for a I–O classification (exempt from all military service), petitioner appealed to the State Selective Service Appeal Board (A. App. 10a, 57a). Petitioner's selective service file was forwarded to the Appeal Board and, in due course, referred to the Department of Justice for inquiry, hearing and recommendation under the provisions of Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)).

At the hearing on August 18, 1964, petitioner, supported by articles and statements by himself and others, testified concerning his concept of the just war

doctrine and the limitations religiously imposed thereby upon him (G. App. 1–23). Essentially, petitioner accepted the view taught by some Catholic theologians dating back to the period of St. Augustine [2] that Christians can participate as combatants only in a "just" war as defined and delineated by some six or seven characteristics as follows (A. App. 35a–36a; S. App. 1a, 17a–18a): (1) the cause of the war must be just; (2) the war must be declared and conducted by legitimate authority; (3) the war must be the last resort, when all other means of settling the dispute have failed; (4) there must be a reasonable assurance of a successful outcome; (5) there must be a "right intention" on the part of those responsible for declaring and conducting the war; (6) there must be a proportionality in which the good effects outweigh the evil; and (7) only legitimate means of warfare may be used, particularly in regard to direct attacks upon civilians.

From the documents and testimony, the hearing officer found that petitioner's basic position in applying the just war criteria was (G. App. 14–15):

> (1) that indiscriminate mass bombing of cities and civilians and the use of nuclear weapons is the use of an illegitimate means of warfare and one which will inevitably produce a proportionality in which evil outweighs good with little or no reasonable assurance of a successful outcome, (2) that the United States Government is in-

[2] It is undisputed that the just war doctrine exists in Catholic tradition, but is not an officially adopted position of the Church; nor has it ever been officially applied to a particular war (*e.g.*, A. App. 62a; G. App. 16).

> evitably committed to the use of indiscriminate mass bombing of cities and civilians and the use of nuclear weapons should it again participate in a war, and (3) therefore, any war in which the United States would participate in the future would not be a "Just War".
>
> * * * * *
>
> He believes that no future war can be a "Just War", but this belief is not a religious belief but a personal opinion or view as to the anticipated nature of the next war which he has adopted from his readings of books by Catholic theologians.

Petitioner testified that he could not in conscience object to participation in a "Just War" (A. App. 106a; G. App. 15). He further stated that he had no objection to the use of conventional or nuclear weapons against troops; no objection to the bombing of factories even though it may cause incidental deaths of civilians in the area; no objection to the taking of life; no objection to serving as a soldier if the troops were armed with guns that shot only bullets, so long as military policy precluded the use of morally illegitimate weapons of warfare and indiscriminate bombings of cities having no military value (A. App. 107a; G. App. 17, 19).

The hearing officer concluded that petitioner's minor premise—that the United States was inevitably committed to indiscriminate mass bombing of civilians and use of nuclear weapons—was not a religious belief based on fact but was essentially a historical prediction of a political nature, stating (G. App. 15):

> It is not a fact; rather, it is a prediction.

> Neither Registrant nor the heads of the military and political establishments of this country can predict how the United States will fight its next major war. Nor can it now be determined on any basis that the facts and circumstances at the time of a next major war will be such that any particular mode of conducting the war can be *a priori* classified as morally illegitimate. This is so because moral judgments are dependent upon the circumstances in which conduct is undertaken and the intention of the actor at the time the action is taken.

The hearing officer, while concluding that petitioner was sincere in his adherence to the just war doctrine (G. App. 21), found that he had not demonstrated a conscientious objection to participation in war in any form, the standard prescribed by 50 U.S.C. App. 456 (j) (G. App. 22). Accordingly, he recommended that petitioner be classified I–A.

Based on the report of the hearing officer, the Department of Justice recommended to the State Appeal Board that petitioner be classified I–A (A. App. 103a–108a). The three-member Appeal Board did so by a unanimous vote (A. App. 13a–14a). On December 21, 1964, petitioner was mailed orders to report for induction into the Armed Forces of the United States on January 6, 1965 (A. App. 14a–15a). On January 6, 1965, petitioner reported to the induction station but refused to submit to induction (A. App. 18a, 68a–69a; G. App. 33–39).

ARGUMENT

1. Contrary to petitioner's assertion (Pet. 12–16), there is no conflict between the instant case and this

Court's decision in *Sicurella* v. *United States,* 348 U.S. 385, giving rise to an arbitrary discrimination between Catholic and other classes of conscientious objectors. The statute applies equally to exempt from military service all persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form (50 U.S.C. App. 456(j)). Petitioner is admittedly not conscientiously opposed to either combatant or non-combatant participation in wars which meet the criteria he delineated in his concept of a "just war" (see *supra,* p. 6). Unlike the petitioner in *Sicurella,* who unequivocally objected to participation in all carnal warfare and all use of carnal weapons, the instant petitioner's "just war" precisely fits the actual shooting wars "that Congress had in mind * * * when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets" (*Sicurella* v. *United States,* 348 U.S. at 391).

To meet the congressional prescription, the objection must be a general scruple, religiously founded, *against participation in war in any form* and not merely an objection to participation in a particular kind of war. See *United States* v. *Kauten,* 133 F. 2d 703 (C.A. 2); *United States* v. *Kurki,* 255 F. Supp. 161, 165 (E.D. Wis.), affirmed, 384 F. 2d 905 (C.A. 7), certiorari denied, January 29, 1968, No. 641 Misc., this Term. Petitioner's asserted conclusion that it is inconceivable that a "just war" will ever happen—based on his view of the history of warfare, present military policy of the United States, current technology and

the imperfections of humanity (Pet. 13; see Pet. App. 33a)—does not militate against the hearing officer's finding, grounded on ample evidence, that this view was not of religious origin, but was an opinion or judgment based on petitioner's personal analysis of warfare from an historical as well as a contemporary point of view (A. App. 107a; G. App. 15–16, 19, 21–22).

It is our view that Congress never intended to exempt from military service one whose conscientious objection to an actual or potential war depends upon the individual's application of his own judgment to present or predicted policy, existing authority, motives of participants or analysis of historical and political events surrounding carnal warfare. Congress sought to recognize, as it has recognized since the inception of this country, general religious objections to participation in war based on inherent characteristics of military combat, for example, a religious scruple against application of violent force to others or a belief that it is wrong to kill. We think it clear that Congress could validly exclude one who professes to oppose only "unjust" wars, and whose personal view is that all future wars are likely to fit into that category, from the pertinent exemption provisions of the Selective Service Act.[3] A fair reading of the statutory language, we submit, shows that Congress fully in-

[3] Exemptions from military service rest upon the grace of the government and not upon constitutional right. *E.g.*, *United States* v. *Macintosh*, 283 U.S. 605, 623; *Fleming* v. *United States*, 344 F. 2d 912, 915 (C.A. 10); *Clark* v. *United States*, 236 F. 2d 13, 23 (C.A. 9), certiorari denied, 352 U.S. 882.

tended to do so "when it said the thrust of conscientious objection must go to 'participation in war in any form.' " *Sicurella* v. *United States,* 348 U.S. at 390; see also *United States* v. *Hartman,* 209 F. 2d 366, 370–371 (C.A. 2); *Taffs* v. *United States,* 208 F. 2d 329, 331 (C.A. 8), certiorari denied, 347 U.S. 928. Nothing in *United States* v. *Seeger,* 380 U.S. 163, is to the contrary, for there the individuals represented that they were opposed "to participation in war in any form" (*id.* at 165), and the question involved was whether their opposition was sufficiently grounded on religious considerations.

Here the Selective Service Appeal Board's determination that petitioner was not conscientiously opposed to participation in war in any form cannot be overturned unless there is no basis in fact for that conclusion. *E.g., Witmer* v. *United States,* 348 U.S. 375, 380–381; *Dickinson* v. *United States,* 346 U.S. 389, 396; *Estep* v. *United States,* 327 U.S. 114. Petitioner's frank admission that he can in good conscience participate in a just, carnal war (see *supra,* p. 6) makes further review by this Court unwarranted.[4]

2. There is no merit in petitioner's claim (Pet. 16–18) that he was denied procedural due process. Petitioner complains that he was not directly notified of the existence of government appeal agents with authority under 32 C.F.R. 1626.61(b) to recommend

[4] It is not true, as petitioner seeks to suggest, that no practicing Catholic could be deemed to be a sincere conscientious objector. The record for the period of World War II, 1940–1947, for which statistics are available, shows that those given conscientious objector status included Catholics. See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, p. 318 (1950).

to the State Selective Service Director at any time (within 10 days of the mailing of the notice of classification or at any time before receipt of the notice to report for induction) that the State Director either appeal to the President or request the Appeal Board to reconsider its determination.[5] The fact that there were such agents was not then stated in individual notices, although notice of this was posted at the board offices. However, the most that the appeal agent could have done for petitioner was to make a recommendation to the State Director who, under the regulations, can act without such recommendation "at any time." Petitioner himself brought the matter to the attention of the State Director shortly after he received his notice to report for induction, and the State Director responded that his intervention was not warranted (S. App. 46a–49a).[6] Petitioner's position had been fully spread on the record in the regular appeal and did not materially change over the two years

[5] Availability of appeal agents to advise registrants is now indicated on the "Notice of Classification" (SSS Form 110) and on a covering letter sent with such notice (SSS Form 217). If the registrant requests assistance, the local board will make an appointment with an appeal agent. The registrant is notified of such appointment on a standard form (SSS Form 218).

[6] Petitioner did not have the right of appeal to the President because the determination of the Appeal Board was unanimous. 32 C.F.R. 1627.3. The action of the government appeal agent is strictly limited to a recommendation to the State Director based on whether he deems reconsideration or appeal to be in the national interest or necessary to avoid injustice. The Director of Selective Service or the State Director may, independent of any recommendation from an appeal agent, request reconsideration by the Appeal Board or appeal to the President "at any time." See 32 C.F.R. 1626.61(a) and 1627.1(a).

involved. The hearing officer, the Chief of the Conscientious Objector Section of the Department of Justice and the Appeal Board all unanimously agreed that petitioner did not meet the statutory requirements for exemption as a conscientious objector. On this record, it is extremely remote and speculative to suggest that the appeal agent would have made a favorable recommendation, much less that the State Director would have acted on it to appeal or request reconsideration which would have resulted in a reversal of the original determination.

In any event, the system of notice used by the Local Board here was adequate to withstand attack on due process grounds. Although the regulation providing for appeal agents does not require any particular method of notice apart from the publication of the regulation itself (32 C.F.R. 1604.71), the Local Board here posted names and addresses of appeal agents conspicuously on the bulletin board in the public spaces used by registrants. This is exactly the same procedure required by regulation for giving notice of names and addresses of "advisors to registrants" appointed under 32 C.F.R. 1604.41.[7] Petitioner had visited his Local Board some three times prior to his refusal to submit to induction, and thus had ample op-

[7] In this Court, petitioner has dropped his complaint below that he was denied due process by failure to tell him about the existence of advisors to registrants, presumably because the Local Board had admittedly complied with the posting provisions of the regulation. See, *e.g.*, *United States* v. *Sturgis*, 342 F. 2d 328 (C.A. 3), certiorari denied, 382 U.S. 879; *Bradshaw* v. *United States*, 242 F. 2d 180, 184–185 (C.A. 10); *Steele* v. *United States*, 240 F. 2d 142 (C.A. 1); *Frank* v. *United States*, 236 F. 2d 39, 43 (C.A. 9).

portunity to see such notices and other information of interest to registrants which was posted there (A. App. 48a–49a). The method used was reasonably calculated to give actual notice. Moreover, petitioner's complaint of lack of knowledge of appeal agents and their powers is directed at the end of a two-year appeal process during which petitioner was an active pacifist supported by numerous persons of similar persuasion knowledgeable in selective service procedures. Indeed, petitioner was accompanied to the Department of Justice hearing by a Thomas Cornell, associate editor of the *Catholic Worker,* a member of the Central Committee of Conscientious Objectors and a member of the American PAX Association. Cornell stated at the hearing that the latter two organizations are engaged in counseling conscientious objectors and "in affording them legal and moral support" (G. App. 1–2).[8]

Petitioner's further suggestion that he was somehow prejudiced by the mailing of his induction notice only six days after mailing of his notice of classification (Pet. 3, 17–18) is without merit. The appeal agent could enter his recommendation "[a]t any time within 10 days after the date when the local board mails to the registrant a Notice of Classification * * * or at any

[8] Petitioner's intimation that regulations prevented him from seeking private legal counsel (Pet. 16–17) is unwarranted. The fact that selective service processing is considered a non-adversary process not involving right to counsel in no way prevents or discourages a registrant from seeking advice, legal or otherwise, from the Local Board, appointed advisors, appeal agents, private attorneys, or any other persons. Petitioner obviously drew on numerous sources for counsel and advice in the course of his appeal.

time before the registrant is mailed an Order to Report for Induction * * *" (32 C.F.R. 1626.61). As the court of appeals pointed out (Pet. App. 14a), the mailing of the induction notice did not under the regulations shorten the ten-day period for action by the appeal agent after notice of classification.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE, 1968